219513

STATE OF SOUTH CAROLINA)
)

(Caption of Case)

Happy Rabbit, LP on behalf of Windridge Townhomes,
Complainant,

v.

Alpine Utilities, Inc.,
Respondent.

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET NUMBER: 2008 - 360 - S

(Please type or print)

Submitted by: Benjamin P. Mustian, Esquire **SC Bar Number:** 68269

Address: Post Office Box 8416 **Telephone:** 803-252-3300

Columbia, SC 29202 **Fax:** 803-771-2410

Other:

Email: bmustian@willoughbyhoefer.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

☐ **Emergency Relief demanded in petition**

☐ **Request for item to be placed on Commission's Agenda expeditiously**

☒ **Other:**

INDUSTRY (Check one)

- ☐ Electric
- ☐ Electric/Gas
- ☐ Electric/Telecommunications
- ☐ Electric/Water
- ☐ Electric/Water/Telecom.
- ☐ Electric/Water/Sewer
- ☐ Gas
- ☐ Railroad
- ☒ Sewer
- ☐ Telecommunications
- ☐ Transportation
- ☐ Water
- ☐ Water/Sewer
- ☐ Administrative Matter
- ☐ Other:

NATURE OF ACTION (Check all that apply)

- ☒ Affidavit
- ☐ Agreement
- ☐ Answer
- ☐ Appellate Review
- ☐ Application
- ☐ Brief
- ☐ Certificate
- ☐ Comments
- ☐ Complaint
- ☐ Consent Order
- ☐ Discovery
- ☐ Exhibit
- ☐ Expedited Consideration
- ☐ Interconnection Agreement
- ☐ Interconnection Amendment
- ☐ Late-Filed Exhibit
- ☐ Letter
- ☐ Memorandum
- ☐ Motion
- ☐ Objection
- ☐ Petition
- ☐ Petition for Reconsideration
- ☐ Petition for Rulemaking
- ☐ Petition for Rule to Show Cause
- ☐ Petition to Intervene
- ☐ Petition to Intervene Out of Time
- ☐ Prefiled Testimony
- ☐ Promotion
- ☐ Proposed Order
- ☐ Protest
- ☐ Publisher's Affidavit
- ☐ Report
- ☐ Request
- ☐ Request for Certification
- ☐ Request for Investigation
- ☐ Resale Agreement
- ☐ Resale Amendment
- ☐ Reservation Letter
- ☐ Response
- ☐ Response to Discovery
- ☐ Return to Petition
- ☐ Stipulation
- ☐ Subpoena
- ☐ Tariff
- ☒ Other: Return to Request for Supersedeas

Print Form Reset Form

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

930 RICHLAND STREET

P.O. BOX 8416

COLUMBIA, SOUTH CAROLINA 29202-8416

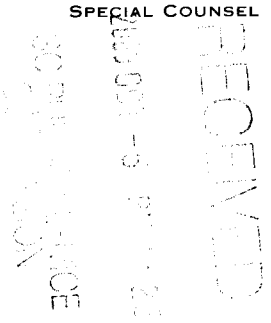
MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL
ELIZABETH ZECK*
BENJAMIN P. MUSTIAN
MICHAEL R. BURCHSTEAD
ANDREW J. MACLEOD

*ALSO ADMITTED IN TX

AREA CODE 803
TELEPHONE 252-3300
TELECOPIER 256-8062

TRACEY C. GREEN
ALAN WILSON
SPECIAL COUNSEL

October 5, 2009



VIA HAND-DELIVERY
The Honorable Charles L.A. Terreni
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

RE: Happy Rabbit, LP on behalf of Windridge Townhomes v. Alpine Utilities, Inc.; Docket No. 2008-360-S

Dear Mr. Terreni:

Enclosed for filing on behalf of Alpine Utilities, Inc. are the original and one (1) copy of the Return to Request for Supersedeas in the above-referenced matter. By copy of this letter, I am serving a copy of these documents upon the parties of record to this proceeding and enclose a Certificate of Service to that effect.

I would appreciate your acknowledging receipt of these documents by date-stamping the extra copies that are enclosed and returning the same to me via our courier.

If you have any questions, or if you need any additional information, please do not hesitate to contact me.

Sincerely,

WILLOUGHBY & HOEFER, P.A.

Benjamin P. Mustian

BPM/cf
Enclosures
cc: Nanette S. Edwards, Esquire
Richard L. Whitt, Esquire

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2008-360-S

IN RE:

Happy Rabbit, LP on behalf of Windridge, Townhomes,

Complainant,

v.

Alpine Utilities, Inc.,

Defendant.

RETURN TO REQUEST FOR SUPERSEDEAS

Defendant Alpine Utilities, Inc. ("Alpine"), reserving all rights heretofore asserted in the above-captioned docket[1], submits the within return in opposition to the "Request" of Complainant Happy Rabbit, LP ("Happy Rabbit") to the Commission for a "supersedeas order" in the above-captioned matter pursuant to Rule 241(d)(1), SCACR. For the reasons discussed below, Happy Rabbit has (1) failed to properly apply for the relief requested and (2) has failed to demonstrate grounds for the relief requested. Accordingly, the request should either be stricken because it is insufficiently drawn or, alternatively, denied. Further, should the Commission be disposed to grant the relief requested, same should be conditioned upon the requirement that Happy Rabbit post a sufficient bond to secure the charges for sewer service already provided to

[1] As the Commission is aware, Alpine has contested the Commission's jurisdiction in this matter. See, *e.g.*, discussion of Alpine's motion to dismiss in Commission Order No. 2009-496.

Happy Rabbit by Alpine which are past due and the amount of any future sewer service charges.

1. Happy Rabbit's filing is deficient on its face and should be stricken.

Although Happy Rabbit correctly cites to Rule 241(d)(1), SCACR, for the proposition that it is required to first seek a supersedeas from the Commission before it may apply to an appellate court for that relief, nowhere in its "Request" does Happy Rabbit reference the requirements attendant to a submission of an application to the Commission for supersedeas. Under S.C. Code Ann. §1-23-280(2), an appeal of a Commission decision does not stay enforcement of the Commission's orders. *Cf.* Rule 241(b)(11), SCACR. In order to obtain a supersedeas of a Commission order, Happy Rabbit is required to file "a petition under Rule 65 of the South Carolina Rules of Civil Procedure." See §1-23-380(2). Under Rule 65(f)(1), remedial writs, such as supersedeas, may only be issued upon service of a motion which "**shall be** supported by affidavit...setting forth clearly the facts entitling the moving party to such writ." (Emphasis supplied.) The material allegations of Happy Rabbit's "Request," even if pertinent to the application of Happy Rabbit for a supersedeas (which is denied), are not supported by an affidavit as required by Rule 65(f)(1). Accordingly, Happy Rabbit has failed to properly apply for the writ and its "Request" should therefore be stricken as insufficient on its face.

2. Grounds warranting issuance of a supersedeas have not been stated.

In determining whether or not a writ of supersedeas should issue, the Commission "**must consider** whether it is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Toal, J.H., Vafai, S., Muckenfuss, R.A., *Appellate Practice in South Carolina*, 2d Ed., 155; citing former Rule 225(c)(2), SCACR. (Emphasis supplied).[2] In

[2] Former Rule 225(c)(2), SCACR, was renumbered by the Supreme Court by order dated April 29, 2009, and is now denominated Rule 241(c)(2), SCACR.

other words, a party seeking supersedeas must be able to demonstrate it has "just reason to apprehend that without a stay, [the party] would be deprived of the benefit of a reasonable result of the appeal." *Porter v. Lesesne*, 85 S.C. 399, 67 S.E. 453 (1910) (holding, in a case prior to the enactment of the SCACR, that a previously granted supersedeas should be withdrawn where the applicant for supersedeas could be returned to the *status quo* by a successful appeal.) *Melton v. Walker*, 209 S.C. 330, ___, 40 S.E.2d 161, 164 (1946) (holding that the effect of a supersedeas is to preserve the *status quo* pending the determination of an appeal). An applicant for a writ of supersedeas must also demonstrate that the absence of a supersedeas will work an irreparable harm or a miscarriage of justice. *Kuhn v. Electric Mfg. & Power Co.*, 92 S.C. 488, 75 S.E. 791 (1912). Finally, a strong showing of a likelihood of success on the merits is also usually required in order to justify issuance of the writ. *See* 4 C.J.S. *Appeal & Error* §417 (1993). Alpine submits that Happy Rabbit's "Request" fails to demonstrate its satisfaction of these standards. Moreover, Alpine submits that Happy Rabbit cannot satisfy these standards for the reasons discussed below.

a. Denial of supersedeas will neither deprive an appellate court of jurisdiction nor moot the appeal.

If Happy Rabbit's "Request" for a supersedeas is denied by the Commission, it would not deprive the appellate court of jurisdiction of an appeal or moot Happy Rabbit's appeal. This is so because, according to Happy Rabbit's own filings in the instant docket, Happy Rabbit has the ability to seek a refund of any unlawful charges imposed by Alpine under S.C. Code Ann. R. 103-533.3. *See* Happy Rabbit Motion to Amend Complaint, April 6, 2009. Thus, in the event that Happy Rabbit is required to pay for the sewer services (previously rendered and to be rendered by Alpine) as a result of the Commission's orders in this matter, but Happy Rabbit

prevails in its appeal, Happy Rabbit has already asserted that Commission regulations afford it the ability to seek a refund of any amounts paid. Although Alpine disputes the applicability of R. 103-533.3 in the instant matter, it is the burden of Happy Rabbit to establish entitlement to a supersedeas and it cannot have it both ways. Either the Commission has jurisdiction over this matter under R. 103-533.3, in which case Happy Rabbit's appeal would not be mooted if a supersedeas does not issue but Happy Rabbit prevails on the merits, or the Commission has no jurisdiction, in which case Happy Rabbit's appeal is without merit as a matter of law. Under either circumstance, Happy Rabbit is not entitled to a supersedeas.

b. Happy Rabbit will not be irreparably harmed and no miscarriage of justice will occur if a supersedeas is not issued.

For the same reasons discussed in Part 2.a above, denial of supersedeas will not expose Happy Rabbit to irreparable harm or a miscarriage of justice.

c. No likelihood of success on the merits exists.

In order to demonstrate a likelihood of success on the merits, Happy Rabbit must show that there is a fair question raised as to the existence of a legal right to relief on the merits of its underlying claim. *Williams v. Jones*, 92 S.C. 342, 75 S.E. 705 (1912). Alpine submits that Happy Rabbit has not met this requirement given that its "Request" is devoid of any legal analysis in regard to the merits of its claim. Moreover, Alpine submits that Happy Rabbit cannot meet this requirement in view of the circuit court's disposition of Happy Rabbit's claim based upon S.C. Code Ann. § 27-33-50 which, regardless of the Commission's views with respect to its jurisdiction in this docket, cannot be reversed by the Commission as it lacks any authority to review orders of the circuit court. That being the case, Happy Rabbit cannot establish that a fair

the potential benefit of the promisee. *Id.* No such agreement exists here, with any action taken by Happy Rabbit in this regard having been unilateral in nature and not supported by any consideration paid to Alpine.

Further, Happy Rabbit's analysis in this regard turns the law on its head. Under Rule 241(c) (3), SCACR, it is Happy Rabbit's ability to satisfy an obligation, and not Alpine's, which is the relevant consideration. ("The granting of supersedeas...may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as...the administrative tribunal...may deem appropriate.")[5]

Finally, Happy Rabbit's "Request" only reinforces the appropriateness of the Commission requiring a bond of Happy Rabbit if it is inclined to supersede its prior orders in this docket. Obviously, Happy Rabbit understands that Alpine is entitled to protection from Happy Rabbit's failure to pay for the sewer service rendered by Alpine. Otherwise, it would not be reserving funds to satisfy its obligations to Alpine as it claims to be doing. And, Happy Rabbit will not be prejudiced by the requirement of a bond since it claims that it has the funds on hand to satisfy the current past due amount and is willing to devote such funds as are necessary to satisfy any future amounts incurred in sewer service charges by Alpine.

In light of the foregoing, Alpine submits that the Commission should direct that Happy Rabbit post a bond in order to secure its obligations to Alpine if a supersedeas is to issue. Happy Rabbit's unilateral action to reserve funds is patently insufficient in view of the legal requirements for such a bond. See S.C. Code Ann. §§ 15-1-230 and 260. The total amount due

---

[5] In fact, Happy Rabbit's contentions regarding Alpine's financial condition (even if accurate, which is disputed) actually supports not granting a supersedeas inasmuch as, according to Happy Rabbit, Alpine is in need of every dollar in service revenue that it can get. Thus, by the terms of its own "Request," Happy Rabbit is seeking to impose financial constraints on Alpine which are inconsistent with Happy Rabbit's position regarding Alpine's financial condition. Again, Happy Rabbit cannot have it both ways.

question exists as to the existence of a legal right to relief. [3] Accordingly, no supersedeas should be issued.

3. If supersedeas is warranted, it should be conditioned upon the posting of a bond by Happy Rabbit.

In support of its "Request", Happy Rabbits states that it "has maintained an Escrow Account at...Carolina First Bank from the first month of its dispute with Alpine" in which it has deposited the sum of money "equal to its monthly sewer charge from Alpine." Happy Rabbit then attempts to justify issuance of a supersedeas by unsubstantiated and/or speculative assertions pertaining to the ability of Alpine to "refund the funds escrowed by Happy Rabbit."[4]

Initially, Alpine submits that, as described by Happy Rabbit's "Request", no escrow has been established as a matter of law. "An escrow is a written instrument, which, by its terms, imports a legal obligation, and which is deposited by the grantor, promisor (*sic*), or obligor, or his agent with a stranger or third party, to be kept by the depositary until the performance of a condition or the happening of a certain event, and then to be delivered over to the grantee, promisee or obligor." *Brockington v. Lynch*, 119 S.C. 273, ___, 112 S.E. 94, 103 (1922) *quoting* 10 R. C. L. 621; 16 Cyc. 561. In order for a valid escrow to exist, there must be a written agreement supported by consideration under which property is deposited with a third party for

---

[3] Understandably, Happy Rabbit did not submit to the Commission with its "Request" for supersedeas a copy of the circuit court's order in the action referenced by the Commission in Order Nos. 2009-496 and 2009-653 which dismisses Happy Rabbit's complaint pursuant to Rule 12(b)(6), SCRCP. A copy of that order is attached for the Commission's reference.

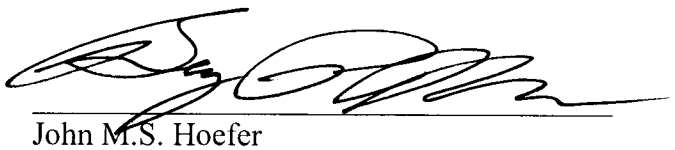
[4] As noted above, the factual statements set forth in the "Request" of Happy Rabbit are not supported by affidavit. Furthermore, if the financial status of any party to this litigation is relevant to the instant matter, it is Happy Rabbit's. See discussion of Rule 241(c)(s), SCACR, *infra*. Finally, Happy Rabbit raises purported concerns about Alpine's "future business viability" and its assertion that "Alpine did not receive even 50% of the rate relief it sought to preserve its financial integrity." Request at p. 2. To the contrary, Happy Rabbit previously asserted to the Commission that Alpine's rates "are reasonably designed to allow the Company to provide service to its sewer customers at rates and terms and conditions of service that are fair, just and reasonable and provides the opportunity to recover a fair and reasonable level of revenue." Docket No. 2008-190-S, Settlement Agreement at ¶ 2. Furthermore, Happy Rabbit agreed that the Company's rates "preserv[e] the financial integrity of the Company." Id at ¶ 3. It, therefore, appears that Happy Rabbit's assertions in this regard are disingenuous.

currently from Happy Rabbit to Alpine is $12,225.71. Affidavit of Patricia A. Gillam, October 2, 2009, at ¶5. The monthly sewer service charge for Happy Rabbit from Alpine is $770.50, exclusive of late charges. Gillam Affidavit at ¶6. Assuming that Happy Rabbit's appeal will take at least one year to be resolved, Alpine submits that an appropriate bond amount would be $25,000.

4. Conclusion

Happy Rabbit has failed to submit an application for supersedeas in accordance with the requirements of law and, because it is facially deficient, it should be stricken. Alternatively, Happy Rabbit's "Request" should be denied on the ground that it has failed to demonstrate that it is entitled to supersedeas of the Commission's orders. Finally, should the Commission be disposed to grant the relief requested, it should be conditioned upon the filing of a bond that is legally and financially sufficient to protect Alpine as stated hereinabove.

Respectfully submitted,



John M.S. Hoefer
Benjamin P. Mustian
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
803-252-3300
Attorneys for Defendant

Columbia, South Carolina
This 5th day of October, 2009

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON
COUNTY OF RICHLAND)	PLEAS FOR THE
	FIFTH JUDICIAL CIRCUIT
Happy Rabbit, a South Carolina)	
Limited Partnership, and Carolyn D.)	Civil Action No. 2008-CP-40-06619
Cook,)	
Plaintiffs,)	
)	
v.)	**ORDER OF DISMISSAL**
)	
Alpine Utilities, Inc.,)	
Defendant.)	
)	

This matter is before me on the motion of Defendant Alpine Utilities, Inc. ("Alpine") to dismiss the Complaint[1] ("Complaint") of Plaintiffs Happy Rabbit, a South Carolina Limited Partnership ("Happy Rabbit"), and Carolyn D. Cook ("Mrs. Cook") pursuant to Rule 12(b)(6), SCRCP. In addition to the Complaint and Alpine's motion and supporting memorandum dated July 1, 2009, the Court also has before it Plaintiffs' December 11, 2008, return to the motion, their April 22, 2009, supplemental return to the motion, and their July 1, 2009, memorandum in opposition to the motion. For the reasons set forth below, Alpine's motion is granted and the Complaint is dismissed.

[1] The Plaintiffs filed and served their original complaint on September 12, 2008. They amended their original complaint as a matter of course under Rule 15(a), SCRCP, on March 18, 2009, to, *inter alia*, state a cause of action under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq. (1976, as amended) ("SCUTPA"). References herein to the "Complaint" include the amended complaint. Plaintiffs have moved to further amend their Complaint to assert a class action claim and to effectively withdraw their SCUTPA claim. At the July 9, 2009, hearing in this matter, however, counsel for Plaintiffs advised the Court that Plaintiffs intend to withdraw their motion to further amend the Complaint in the event that their motion to certify a class action under Rule 23, SCRCP, also heard by the Court on that date, is denied and thereby preserve their SCUTPA claim. Because the Court concludes that Alpine's motion to dismiss should be granted, no SCUTPA claim is left to be pursued and the motion for class certification is therefore moot.

I. Factual Background

The pertinent facts alleged in the Complaint are undisputed. The Plaintiffs are the former and current owners of a residential rental complex consisting of twenty three buildings of two dwelling units each which they rent to third party tenants. Alpine is a public utility providing sewer service in Richland County. In order to secure sewer service to the complex, Plaintiffs entered into a customer relationship with Alpine and paid Alpine on a monthly basis for sewer services rendered. The gist of Plaintiffs' claim is that it was and is unlawful for Alpine to continue maintaining a utility/customer relationship with Plaintiffs from and after the effective date of S.C. Code Ann. § 27-33-50 (2007), which was July 1, 2002, and that Alpine was and is required under that statutory provision to establish and maintain a utility/customer relationship with each of the individual third party tenants in the complex. Plaintiffs allege that the enactment of S.C. Code Ann. § 27-33-50 relieved them from their obligation as the customer of Alpine to pay Alpine for the utility services rendered to the complex and required Alpine to establish customer accounts with the individual tenants and "to change the character of sewer services [provided]" to the complex. Plaintiffs also allege that, as early as October 6, 2003, James C. Cook ("Mr. Cook"), husband of Mrs. Cook[2], contacted Alpine regarding § 27-33-50 and demanded that Alpine terminate the sewer services being provided to the complex and establish customer accounts with the individual tenants

[2] Although not stated in the Complaint, Alpine asserts that Mr. Cook is also a general partner of Happy Rabbit and a retired member of the South Carolina Bar, in addition to being Mrs. Cook's husband. And, at the hearing on the within motion, counsel for Plaintiffs referred to Mr. Cook as "my client" and a "retired attorney." Regardless, it is apparent from paragraph 9 of the Complaint and Plaintiffs' July 1, 2009, memorandum in opposition to the motion that Plaintiffs had authorized Mr. Cook to act as their representative.

of the complex. Plaintiffs seek actual damages from Alpine of approximately $22,000 (which consists of the sewer service fees paid by Plaintiffs to Alpine for the three years preceding the filing of their complaint) and punitive damages for the alleged violation of § 27-33-50 plus treble damages and attorneys fees for the alleged violation of SCUTPA.

II. Rule 12(b)(6) Standard

In considering this motion, the Court must base its ruling solely on the allegations contained in the Complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). The Court must grant the motion if, viewing the facts in the light most favorable to the plaintiffs, their allegations, including reasonable inferences, do not support relief under any theory of the case. *E.g., Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001).

III. Section 27-33-50

As noted above, Plaintiffs' causes of action are based upon an alleged violation of § 27-33-50 by Alpine. By way of 2002 S.C. Acts 336 and 2003 S.C. Acts 63, the South Carolina General Assembly amended the South Carolina Code of Laws to add § 27-33-50, which reads as follows:

> (A) Unless otherwise agreed in writing, a tenant has sole financial responsibility for gas, electric, water, sewerage, or garbage services provided to the premises the tenant leases, and a landlord is not liable for a tenant's account.
>
> (B) An entity or utility providing gas, electric, water, sewerage, or garbage services must not:
>
> (1) require a landlord to execute an agreement to be responsible for all charges billed to premises leased by a tenant; or
>
> (2) discontinue or refuse to provide services to the premises the tenant leases based on the fact that the landlord refused to execute an agreement to be responsible for all the charges billed to the tenant leasing that premises.

(C) This provision does not apply to a landlord whose property is a multi-unit building consisting of four or more residential units served by a master meter or single connection.

IV. Discussion/Analysis

A. MEANING OF SECTION 27-33-50

Alpine contends that the Complaint fails to state facts sufficient to constitute a cause of action because §27-33-50 does not proscribe Alpine's conduct as alleged by Plaintiffs. For the reasons discussed below, the Court finds as follows:

1. *Plaintiffs have not stated a claim under the plain meaning of § 27-33-50*

Plaintiffs contend that the plain meaning of § 27-33-50 is that Alpine is precluded from "requiring Plaintiffs to be responsible for sewer services to their forty-six tenancies (twenty-three duplex buildings)." Alpine contends that the plain meaning of § 27-33-50 only precludes a utility from requiring a landlord to become responsible for a tenant's account with the utility.

The decision of the Court of Appeals in *Thompson ex rel Harvey v. Cisson Constr. Co.* 377 S.C. 137, 659 S.E.2d 171 (Ct. Apps. 2008) (cert. granted June 24, 2009) provides a comprehensive explication of the plain meaning rule that governs the interpretation of statutes. Therein, the Court of Appeals stated that

> The cardinal rule of statutory interpretation is to determine the intent of the legislature. All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute. The legislature's intent should be ascertained primarily from the plain language of the statute. The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. If a statute's language is

> unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.

Id. 377 S.C. at 156-157, 659 S.E.2d at 180-182 (*internal citations and quotations omitted*). Applying the foregoing rules of interpretation, it is clear that § 27-33-50 does not prohibit a utility from billing the owner of a building, with three or less dwelling units, for utility services provided to the building under an account for utility service that exists between the owner of the building and the utility. In fact, the statute is silent regarding existing utility/customer relationships involving the owner of such a building such as is alleged in the Complaint. Further, the statute only precludes a utility from requiring the owner of such a building "to execute an agreement to be responsible for all charges billed to premises leased by a tenant" or "to execute an agreement to be responsible for all the charges billed to the tenant leasing that premises" and specifically shields such a landlord from liability for the account a tenant of the building has with the utility. The Complaint does not allege that Alpine has required Happy Rabbit to execute any such agreement and makes clear that its tenants have no accounts with Happy Rabbit. Accordingly, no cause of action has been stated under the plain language of the statute.

2. *Even if the statute is ambiguous, it cannot be interpreted in the manner Plaintiffs contend*

Even if the plain language of § 27-33-50 did not compel the result asserted by Alpine, a common sense reading of the statute employing the rules of statutory

construction would. In *Thompson,* the Court of Appeals described the rules applicable to construction of a statute for which legislative intent is not apparent from its plain language as follows:

> If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. In construing a statute, the court looks to the language as a whole in light of its manifest purpose. A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of the words. Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law.

Id. 377 S.C. at 158, 659 S.E.2d at 181-182 (*internal citations and quotations omitted*). Plaintiffs seek to have the Court read § 27-33-50(A) as precluding the maintenance of a pre-existing utility/customer relationship between Plaintiffs and Alpine.[3] In addition to ignoring the express language in that very subsection providing that "a landlord is not liable for a tenant's account," the Plaintiffs' interpretation necessarily reads certain clauses of the statute in isolation inasmuch as the statute contains further, specific prohibitions against a utility making a landlord "execute an agreement" to be responsible or liable for "charges billed to premises

[3] In Complaint ¶ 9, Plaintiffs allege that a utility customer relationship existed between them and Alpine. In Complaint ¶¶ 11-12, Plaintiffs allege that they "did not agree in writing to be responsible for their tenant's [*sic*] sewer service", and that, because Alpine "refus[ed] to terminate sewer service as demanded by [Mr. Cook] on October 6, 2003" and "require[ed] Plaintiffs to be responsible for the sewer services of their forty-six tenancies", Alpine has violated § 27-33-50(A).

leased by a tenant" and "charges billed to the tenant leasing the premises." See § 27-33-50(B)(1) and (2). A construction of § 27-33-50 (A) in isolation of these other provisions of the statute is contrary to law. *Thompson, supra.*

Further, the effect of Plaintiffs' reading of the statute would be to allow them to recover charges for utility services that were requested by Plaintiffs to be provided to the residential rental complex they owned, thereby enabling Plaintiffs to lease units in the buildings to third parties. This would result in a windfall for Plaintiffs given that they will have received the benefit of Alpine's services without having to have incurred the cost of same. *See, e.g., Liberty Mut. Ins. Co. v. S.C. Second Injury Fund,* 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005) (holding that the literal meaning of a statute will not be given effect where the result is to create a windfall.) The Court finds that such a reading of the statute is neither just, beneficial, equitable, reasonable nor fair as required by *Thompson, supra.*

Finally, the Court is persuaded by Alpine's argument that the statute cannot have the meaning assigned to it by Plaintiffs and also create a private cause of action available to Plaintiffs. Alpine argues that, because § 27-33-50 does not expressly provide a cause of action for a violation thereof, a cause of action may only be implied if the statute was enacted for the special benefit of a private party. Alpine's argument in this regard is correct. *See Dema v. Tenet Physician Services-Hilton Head, Inc.*, 678 S.E.2d 430, 434, 2009 WL 1587108, 2 (S.Ct., 2009), *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992). Alpine further argues that giving effect to Plaintiffs' interpretation of § 27-33-50 means that contracts existing between utilities and landlords for the provision of sewer service to

properties within the ambit of the statute would be invalidated and that utilities would be required to incur costs to reconfigure their systems to provide for individual services to each rental unit. Alpine asserts that such a reading of § 27-33-50 would result in violations of S.C. Cons. art. I, §§ 13 and 4, respectively unless the taking or impairment were for a public, as opposed to a private, purpose. Thus, Alpine argues, if a private cause of action under § 27-33-50 may be implied, it cannot be for the special benefit of Plaintiffs. The Court agrees with Alpine. Laws interfering with private contractual obligations may only survive an impairment challenge where they involve a legitimate governmental purpose and are reasonable and necessary to serve an important public purpose. *See Rick's Amusement, Inc. v. State*, 351 S.C. 352, 570 S.E.2d 155 (2001), cert. denied, 122 S.Ct. 1909 (2002). Further, because a statute may not be read in a manner which renders it unconstitutional, *Peoples Nat'l Bank v. S.C. Tax Comm'n*, 250 S.C. 187, 156 S.E.2d 769 (1967), § 27-33-50 cannot be interpreted as conferring on landlords the special benefit of being able to require utilities to install additional facilities connecting the landlords' tenants to the utility systems for the benefit of landlords as Plaintiffs assert inasmuch as that would contravene the proscription against taking private property for private use. See Article I, § 13. For these reasons as well, the Court finds that § 27-33-50 may not be interpreted in the manner Plaintiffs contend it should be interpreted.[4]

[4] Plaintiffs argue that Alpine did not raise this argument as a ground for its motion to dismiss and only raised it in its memorandum in support of its motion and in argument to the Court. Alpine contends that the motion to dismiss does address this argument since it asserts that no cause of action has been stated under § 27-33-50. The Court notes that Alpine's motion does state that it is based on South Carolina law and a memorandum to be submitted. The parties exchanged memoranda on July 1, 2009. In addition, Alpine agreed at hearing that Plaintiffs could submit an additional memorandum on this point if Plaintiffs chose to do so. Plaintiffs have not, however, submitted any additional memorandum on this point. Plaintiffs have therefore had ample notice and opportunity to be heard on the point and, because a motion to dismiss under Rule 12(b)(6) may be raised at any time prior to or at trial of the

IV. Conclusion

For the reasons set forth above, the Complaint fails to state facts sufficient to constitute a cause of action under S.C. Code Ann. § 27-33-50 because the facts alleged do not give rise to a violation of the statute. The statute simply does not proscribe the conduct alleged on the part of Alpine. *Chewning, supra.* Plaintiffs' reading of the statute is contrary to the plain meaning of the language employed by the General Assembly and would violate the rules of statutory construction even if the meaning were not plain. Alpine's motion must therefore be granted.

Because the Court is dismissing the lawsuit, it does not address the Statute of Limitations issue.

IT IS THEREFORE ORDERED THAT the Complaint herein be dismissed.

AND IT IS SO ORDERED.

James R. Barber, III
Presiding Judge

Columbia, South Carolina
This 17th day of September, 2009

---

case, the Court concludes that judicial economy will be served by ruling on the point now instead of later.

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2008-360-S

IN RE:

Happy Rabbit, LP on behalf of Windridge, Townhomes,

Complainant,

v.

Alpine Utilities, Inc.,

Defendant.

AFFIDAVIT OF PAT GILLAM

Before me personally appeared Pat Gillam who, after being duly sworn, deposes and says as follows:

1. I am a citizen and resident of the State of South Carolina, am in excess of eighteen years of age and am competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

2. I am employed as an Office Manager of Alpine Utilities, Inc. ("Alpine"), a party in the above-captioned action. Alpine is in the business of owning and operating a sewer system serving Richland and Lexington Counties, South Carolina as a public utility under the jurisdiction of the Public Service Commission of South Carolina ("Commission"). At all times relevant to the matters raised in the attached pleading and herein, I was and have been employed in this or other capacities by Alpine and am familiar with and have personal knowledge of such

matters.

3. Pertinent to the above-captioned action, Alpine has previously provided and is currently providing sewer service to the development known as Windridge Townhomes, which is owned and operated by Happy Rabbit, L.P ("Happy Rabbit").

4. Happy Rabbit has not remitted payment for sewer service rendered to Windridge Townhomes by Alpine since July 2008.

5. Happy Rabbit's current outstanding balance for sewer service rendered by Alpine to Windridge Townhomes from August 2008 through the date of this filing is $12,225.71.

6. The monthly charges imposed by Alpine upon Happy Rabbit for sewer services rendered to Windridge Townhomes as authorized by its Commission approved rate schedule total $770.50, exclusive of late charges.

FURTHER AFFIANT SAYETH NOT.

Pat Gillam

Sworn and subscribed to before me

this 5 day of October, 2009.

Notary Public for South Carolina

My commission expires: 3/31/2013

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2008-360-S

Happy Rabbit, LP on behalf of Windridge, Townhomes,	)	
Complainant	)	**CERTIFICATE OF SERVICE**
v.	)	
Alpine Utilities, Inc.,	)	
Defendant.	)	

This is to certify that I have caused to be served this day one (1) copy of **Defendant's Return to Request for Supersedeas** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Richard L. Whitt, Esquire
Austin & Rogers, P.A.
Post Office Box 11716
Columbia, SC 29211

Nanette S. Edwards, Esquire
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211

Clark Fancher

Clark Fancher

Columbia, South Carolina
This 5th day of October, 2009.